

Adam C. Abrahms (SBN 206010)
EPSTEIN BECKER & GREEN, P.C.
1925 Century Park East, Suite 500
Los Angeles, California 90067-2506
Telephone: 310.556.8861
Facsimile: 310.553.2165
aabrahms@ebglaw.com

Attorneys for
HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CALIFORNIA NURSES ASSOCIATION,
NATIONAL NURSES ORGANIZING
COMMITTEE,

and

HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

NLRB Case No.: 31-CB-012913

**CHARGING PARTY'S RESPONSE TO
NOTICE TO SHOW CAUSE AND
MOTION FOR REMAND TO THE
ADMINISTRATIVE LAW JUDGE FOR
FURTHER PROCEEDINGS AND TO
REOPEN THE RECORD**

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FOR REMAND TO THE ADMINISTRATIVE LAW JUDGE FOR FURTHER
PROCEEDINGS AND TO REOPEN THE RECORD**

Henry Mayo Newhall Memorial Hospital ("Charging Party" or "Henry Mayo"), by its attorneys Epstein Becker Green, P.C., hereby files its Response to the National Labor Relations Board's ("Board") Notice to Show Cause and Motion for Remand to the Administrative Law Judge for Further Proceedings and to Reopen the Record.

As acknowledged in the Supplemental Decision, Order, and Notice to Show Cause (“Supplemental Decision”), no valid decision exists regarding the 8(b)(1)(A) violation found by the Administrative Law Judge (“ALJ”) in this matter and first considered by the Board in *California Nurses Association*, 359 NLRB No. 150 (2013). A remand and reopening of the record is appropriate in this matter because the ALJ’s finding that Respondent California Nurses Association/National Nurses Organizing Committee (“Respondent”) violated Section 8(b)(1)(A) of the National Labor Relations Act (“Act”) was resolved under the analytical framework of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which the Board overruled in *The Boeing Co.*, 365 NLRB No. 154 (2017). Because the new standard announced in *Boeing* applied retroactively to all pending cases, including the instant matter, a full factual reanalysis by the ALJ in light of the Board’s decision in *Boeing* is necessary for an appropriate determination of whether Respondent violated Section 8(b)(1)(A) of the Act. Correspondingly, the record should be reopened for the purpose of adducing evidence and testimony necessary to determine whether, under *Boeing*, “The *Weingarten* Rights” statement (“*Weingarten* Statement”) Respondent unilaterally printed on the back cover of the parties’ collective bargaining agreement (“CBA”) violates Section 8(b)(1)(A) of the Act.

I. RELEVANT PROCEDURAL HISTORY

On July 9, 2012, the ALJ issued a decision in this matter, finding that Respondent’s unilateral printing of the *Weingarten* Statement on the back of the parties’ CBA violated 8(b)(3) of the Act, and that the content of the *Weingarten* Statement violated Section 8(b)(1)(A) of the Act because it “restrains and coerces employees’ exercise of their Section 7 right to refrain from union activity.” *California Nurses Association*, 2012 NLRB LEXIS 415 at *12 (2012). On July 12, 2013, an unconstitutionally appointed Board affirmed the ALJ’s finding that Respondent violated Section 8(b)(3), but overruled the Section 8(b)(1)(A) violation, based on an analysis under *Lutheran Heritage*. See *California Nurses Association*, 359 NLRB No. 150, slip op. at 6-9 (2013) (citing *Lutheran Heritage*).

On July 29, 2013, Respondent filed a Motion for Reconsideration related to the Board's 8(b)(3) remedy. Separate and apart from Respondent's Motion for Reconsideration on the 8(b)(3) issue, on August 22, 2013, Charging Party petitioned the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") for review of the Board's errant denial of the 8(b)(1)(A) violation. On August 27, 2013, the D.C. Circuit ordered that the case be held in abeyance pending the outcome of the Supreme Court's review of *Noel Canning v. NLRB*, Case No. 12-1115. On January 8, 2014, the Board granted Respondent's Motion for Reconsideration and modified the injunctive language included in its initial 8(b)(3) order but did not modify or reconsider the underlying decision which remained the operative decision. *See California Nurses Association* 360 NLRB No. 21 (2014).

On June 26, 2014, the Supreme Court issued its decision in *Noel Canning v. NLRB*, 134 S.Ct. 2550 (2014), which effectively invalidated any decision issued by the unconstitutionally constituted Board, including the Board's July 12, 2013 Decision in the instant matter. In response, the Board exercised its 10(d) power to set aside the July 12, 2013 Decision and stated that it would "retain this case on its docket and take further action as appropriate." *See California Nurses Association*, 2014 NLRB LEXIS 496 (2014). The Board also filed a Motion to Dismiss with the D.C. Circuit, which the Court granted on August 15, 2014. *See Henry Mayo Newhall Memorial Hospital v. NLRB*, 2014 U.S. App. LEXIS 18126 (2014).

On November 10, 2017, following more than three years without any further action by the Board, Charging Party filed a Motion for a Final Decision on the 8(b)(1)(A) Allegation and Request for Further Clarification. On November 14, 2018, the Board issued the Supplemental Decision in this matter and ordered that "any party seeking to show cause why the issue whether the allegation that 'The Weingarten Rights' statement violated Section 8(b)(1)(A) should not be remanded to the administrative law judge must do so in writing, filed with the Board in Washington, D.C." *California Nurses Association*, 2018 NLRB LEXIS 552 (2018).

II. LEGAL ANALYSIS

This matter should be remanded to the ALJ for further proceedings and the record should be reopened to adduce evidence and testimony regarding whether the *Weingarten* Statement Respondent unilaterally printed on the back cover of the parties' CBA violates Section 8(b)(1)(A) of the Act under *Boeing*. A remand and reopening of the record is appropriate when extraordinary circumstances are present. *See Cobb Mechanical Contractors v. NLRB*, 295 F.3d 1370, 1377-78 (D.C. Cir. 2002); *Medical Center at Princeton*, 269 NLRB 948, 956 (1984) (reopening record appropriate when "special circumstances" exist); 29 C.F.R. 102.48(c) ("A party to a proceeding may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.).

Here, extraordinary circumstances are present and warrant a remand to the ALJ for further proceedings and reopening of the record. The ALJ analyzed the *Weingarten* Statement under a "reasonably construe" standard consistent with the Board's analytical framework set forth in *Luther Heritage* to find that Respondent violated Section 8(b)(1)(A). The unconstitutionally constituted Board likewise applied the *Lutheran Heritage* standard when overturning the 8(b)(1)(A) violation. *See California Nurses Association*, 359 NLRB No. 150, slip op. at 6-9 (2013) (citing *Lutheran Heritage*). The Supreme Court's subsequent decision in *Noel Canning v. NLRB* invalidated the Board's reversal of the ALJ's ruling on the 8(b)(1)(A) allegation, and no valid decision currently exists regarding that unfair labor practice allegation. The Board's subsequent decision in *Boeing* introduced a new standard for evaluating the legality of challenged rules, and applies retroactively to the instant matter. *See Boeing*, 365 NLRB No. 154, slip op. at 70-71 (2017) ("[W]e find that it is appropriate to apply the standard we announced today retroactively to the instant case and to all other pending cases.").

Under current Board law, Respondent's *Weingarten* Statement must be analyzed as a Category 2 or Category 3 challenged rule under the legal framework set forth in *Boeing*. *See* 365 NLRB No. 154, slip op. at 12-14. To conduct an appropriate analysis, the ALJ must receive evidence regarding the Union's intention to interfere with employees' rights by means of the

Weingarten Statement. Charging Party intends to introduce evidence and testimony that Respondent knew the content of the *Weingarten* Statement, when reasonably interpreted, would interfere with employees' Section 7 rights—particularly, in view of the Office of the General Counsel's Advice Memorandum regarding the illegality of the *Weingarten* Statement and Respondent's agreement in 2003 to refrain from printing the *Weingarten* Statement on future CBAs. *See California Nurses Association (Henry Mayo Newhall Memorial Hospital)*, Case 31-CB-11267, dated September 16, 2003 ("2003 Advice Memorandum").¹

In this regard, the Charging Party intends to compel and introduce evidence of Respondent's history and intent in using the overbroad *Weingarten* Statement to purposefully infringe upon employees' rights to refrain from union activity not only at Henry Mayo but at numerous employees in a calculated effort since at least 2003.

Further, under *Boeing*, the ALJ must also examine whether Respondent had any legitimate justifications that would outweigh the extent to which the *Weingarten* Statement interferes with employees' Section 7 rights. *See* 365 NLRB No. 154, slip op. at 60-61 ("In cases in which . . . rules . . . are at issue that, when reasonably interpreted, would potentially interfere with Section 7 rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights *and* (ii) legitimate justifications associated with the requirement(s).") (emphasis in original)). The parties litigated the legality of the *Weingarten* Statement under the *Lutheran Heritage* standard. Thus, the parties did not present sufficient evidence and testimony regarding whether any legitimate justifications outweighed the adverse impact of the *Weingarten* Statement or, as the Charging Party believes the evidence will show, that respondent had no legitimate justification to use the statement as drafted after 2003 but did so with the purpose and intent to chill employees' Section 7 rights. Indeed, the ALJ did not examine the Union's true illegitimate motive or whether any legitimate justifications even existed. Charging Party intends to introduce evidence and testimony that no such legitimate justifications exist to outweigh

¹ Notably the 2003 Advice Memorandum was issued before *Lutheran Heritage* and based on the foundational decision underlying *Boeing*. Should the Board decide not to remand, the 2003 Advice Memorandum should form the analytical framework for confirming the ALJ's 8(b)(1) finding.

Respondent's interference with employees' rights and Respondent's *Weingarten* Statement was promulgated with the intent to infringe on Section 7 rights.

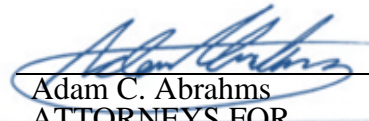
III. CONCLUSION

For the reasons detailed above, Charging Party respectfully requests that the Board grant its Motion, remand the matter to the ALJ for further proceedings, and order that the record be reopened for the purpose of adducing evidence and testimony necessary to determine whether the *Weingarten* Statement violates Section 8(b)(1)(A) of the Act under *Boeing*.

DATED: December 12, 2018

EPSTEIN BECKER & GREEN, P.C.

By:



Adam C. Abrahms
ATTORNEYS FOR
HENRY MAYO NEWHALL MEMORIAL
HOSPITAL

CERTIFICATE OF SERVICE

I, Lynne Conner, hereby certify that on the 12th day of December 2018, I served a true and correct copy of “**CHARGING PARTY’S RESPONSE TO NOTICE TO SHOW CAUSE AND MOTION FOR REMAND TO THE ADMINISTRATIVE LAW JUDGE FOR FURTHER PROCEEDINGS AND TO REOPEN THE RECORD**” via e-mail upon the following:

Micah Berul, In-House Legal Counsel
California Nurses
Association/National Nurses Organizing Committee (CNA/NNOC)
155 Grand Avenue, 2nd Floor
Oakland, CA 94612-3758
mberul@calnurses.org

M. Jane Lawhon, Legal Counsel
California Nurses
Association/National Nurses United (CNA/NNU)
155 Grand Avenue, Legal Department
Oakland, CA 94612
jlawhon@calnurses.org

Nikki N. Cheaney, Esq.
National Labor Relations Board - Region 31
11150 W. Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824
T: 310-235-7712 | F: 310-235-7420
Nikki.Cheaney@nlrb.gov

Mori Rubin
Regional Director
National Labor Relations Board – Region 31
11150 W. Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824
T: 310-235-7352 | F: 310-235-7420

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 12, 2018

/s/ Lynne Conner
Lynne Conner
Epstein Becker & Green, P.C.
1925 Century Park East, Suite 500
Los Angeles, CA 90067